Supreme Court, U.S.
FILED

(1) 96 762 SEP 10 1996

No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

THOMAS G. RUSSELL,

PETITIONER,

-vs-

CITY OF STRONGSVILLE,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF OHIO,
EIGHTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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62 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether a Police Officer Who Approaches an Individual Seated in a Legally Parked Automobile for the Purpose of Investigating Suspicious and/or Criminal Activity Has "Seized" that Individual Within the Meaning of the Fourth Amendment?

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

THOMAS RUSSELL,

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-vs-

CITY OF STRONGSVILLE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF OHIO,
EIGHTH APPELLATE DISTRICT

Petitioner, Thomas Russell, prays that a Writ of Certiorari issue to review the judgment entry of the Court of Appeals of Ohio, Eighth Appellate District entered in the above-entitled on November 30, 1995.

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OPINIONS BELOW

The opinion of the Court of Appeals of Ohio, Eighth Appellate District, captioned City of Strongsville v. Thomas G. Russell, Cuyahoga App. No. 68316 (December 11, 1995) is unreported and reprinted in the appendix. A Petition for Certiorari in the Supreme Court of Ohio was denied for lack of a substantial constitutional question. The order of the Supreme Court of Ohio declining jurisdiction and dismissing Petitioner's appeal is reported at 75 Ohio St.3d 1509 (1996).

JURISDICTIONAL STATEMENT

Petitioner's Motion to Suppress was granted by the trial court on December 13, 1994. The City of Strongsville appealed said trial court decision to the Court of Appeals of Ohio, Eighth Appellate District. On December 11, 1995 the Court of Appeals reversed the decision of the trial court. Petitioner subsequently filed a notice of appeal and memorandum in support of jurisdiction in the Ohio Supreme Court. On June 12, 1996 the Ohio Supreme Court dismissed Petitioner's appeal and declined jurisdiction to hear the case citing a lack of a substantial constitutional question.

The jurisdiction of this Honorable Court is invoked pursuant to Title 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following Amendments to the United States Constitution:

A) The Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On September 20, 1994, at approximately 1:42 a.m., the Petitioner, Thomas Russell, was seated in the driver's seat of his car, a 1986 Ford Tempo. The car was legally parked in a parking lot located adjacent to a Taco Bell restaurant, with the engine turned off. The Petitioner was awake, and seated in an upright position.

At that time, Officer Jeff Mason, of the Strongsville Police Department, was patrolling the area in a marked police cruiser. Officer Mason saw the Petitioner sitting in his car, and grew suspicious because, in his words "[t]here were very few vehicles in the area. There were no people in the area that I could see at all, just stragglers or maybe some vehicles that were parked that may have been employees of Taco Bell." Officer Mason stated that while he was suspicious of the Petitioner, the Petitioner was not trespassing, nor was he in violation of any laws. Additionally, there were no reports of criminal activity to justify the officer's approach of Petitioner's car. Nonetheless, Officer Mason investigated. As he approached the car, he observed keys in the

ignition. Although the engine was off, dashboard lights were illuminated. After an interrogation by the officer, the Petitioner was placed under arrest, and subsequently charged by the City of Strongsville with operating a motor vehicle under the influence of alcohol, and two counts of driving under a license suspension.

On December 12, 1994, a hearing was held on Petitioner's Motion to Suppress Evidence; the Petitioner sought suppression of any and all evidence obtained as a result of the aforementioned seizure. Specifically, Petitioner argued that because the officer lacked reasonable grounds to execute a seizure of the Petitioner, any and all evidence obtained therefrom was in violation of the rights guaranteed him by the Fourth and Fourteenth Amendments to the United States Constitution, and Article 1, Section 10 of the Ohio Constitution. Following this hearing, the trial court granted the Petitioner's Motion to Suppress, ruling that the City presented no evidence demonstrating that Officer Mason possessed "any articulable reason to investigate" the Petitioner's parked vehicle. The City appealed.

The Eighth District Court of Appeals for Cuyahoga County, Ohio, reversed and remanded the trial court, finding that there was no evidence upon which it could conclude that a seizure occurred.

The Petitioner then filed a notice of appeal and jurisdictional memorandum to the Ohio Supreme Court, asserting that the Court of Appeals of Ohio, Eighth Appellate District, erred when it reversed the trial court's decision to grant Petitioner's motion to suppress evidence. On June 12, 1996, the Ohio Supreme Court declined jurisdiction to hear the case, and dismissed the Petitioner's appeal as not involving any substantial constitutional question.

REASONS FOR ALLOWING THE WRIT

I. When a Law Enforcement Officer Approaches an Individual Sitting in a Lawfully Parked Automobile for Investigative Purposes, Said Individual Has Been "Seized" Within the Meaning of the Fourth Amendment.

It has long been recognized that for Fourth Amendment purposes "unreasonable . . . seizures" include seizure of the person. *See* Henry v. United States, 361 U.S. 98, 100, 80 S.Ct. 168, 170 (1959). There is no question that Petitioner possessed the constitutional right of security as he sat in his automobile as "the Fourth Amendment protects people, not places." Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511 (1967). The issue in the within matter is at what point did Officer Mason's encounter with Petitioner become a "seizure". As stated by this Court in Terry v. Ohio, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877 (1968):

> [i]t is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime - - 'arrests' in traditional terminology.

In United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870 (1980), this Court addressed the issue of at what point a law

enforcement encounter with an individual becomes a seizure and concluded:

> [a] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

Id., 446 U.S. at 554, 100 S.Ct. at 1877. *See also*, Michigan v. Chesternut, 486 U.S. 567, 108 S.Ct. 1975 (1988); INS v. Delgado, 466 U.S. 210, 104 S.Ct. 1758 (1984).

In Florida v. Bostick, 501 U.S. 429, 111 S.Ct. 2382 (1991), this Court addressed the issue of whether a police investigative encounter on a bus was a seizure within the meaning of the Fourth Amendment and held that the "free to leave" analysis set forth in Mendenhall was inapplicable due to the fact that Bostick's movements were confined as a natural result of being a passenger on a bus and thus was not a product of police conduct.

In the within matter, a reasonable person in Petitioner Russell's position would not have felt free to leave at the moment that Officer Mason approached his automobile. Further, Petitioner's freedom to move about (i.e., leave the parking lot) was not

restricted by anything but the arresting officer. Accordingly the law enforcement encounter in the within matter is clearly distinguishable from the fact pattern and holding of Bostick.

Assuming *arguendo* that the "free to leave" analysis is not applicable in the within matter, the appropriate inquiry is whether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter. *See* Bostick, 501 U.S. at 436. In applying this analysis, the crucial test is whether, taking into account all the circumstances surrounding the encounter, the police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." Chesternut, 486 U.S. at 569. Applying this analysis to the facts herein, it is clear that a reasonable person in Petitioner's shoes would not have felt free to terminate the encounter. Terminating the encounter which occurred herein would have entailed pulling away from the officer as he approached Petitioner's automobile. Clearly a reasonable person would believe that such conduct would surely lead to pursuit and subsequent apprehension. Accordingly a reasonable person would not feel free to ignore the

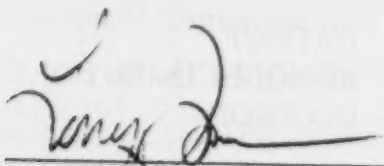
officer's presence and terminate the encounter, thus the encounter herein was a seizure within the Fourth Amendment.

In its decision reversing the trial court, the Ohio Court of Appeals, Eighth Appellate District, decided an important question of federal law (whether a law enforcement officer who approaches an individual sitting in a lawfully parked automobile for investigative purposes has "seized" that individual within the meaning of the Fourth Amendment) which has not been, but should be, settled by this Court.

CONCLUSION

For the foregoing reasons, Petitioner, by and through counsel, hereby respectfully asserts that the petition for writ of certiorari should be granted.

Respectfully Submitted,



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COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 68316

CITY OF STRONGSVILLE	:	ACCELERATED DOCKET
Plaintiff-appellant	:	JOURNAL ENTRY AND OPINION
-vs-	:	
THOMAS G. RUSSELL	:	PER CURIAM
Defendant-appellee	:	
DATE OF ANNOUNCEMENT OF DECISION	:	NOVEMBER 30, 1995
CHARACTER OF PROCEEDING	:	Criminal appeal from Berea Municipal Court Case No. 94-TRC-3124
JUDGMENT	:	REVERSED AND REMANDED
DATE OF JOURNALIZATION	:	DEC 11 1995

APPEARANCES:

For plaintiff-appellant:

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For defendant-appellee:

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LARRY W. ZUKERMAN,
160 Signature Square I
25201 Chagrin Blvd.
Cleveland, Ohio 44122

PER CURIAM:

This cause came on to be heard upon the accelerated calender pursuant to App. R. 11.1 and Loc. R. 25. The city of Strongsville appeals from an order granting defendant Thomas Russell's motion to suppress evidence obtained during an investigatory stop of defendant's automobile. The sole issue raised is whether the trial court erred by finding the arresting officer lacked any articulable reason to approach defendant's automobile and inquire whether defendant needed assistance.

The arresting officer was the sole witness at the suppression hearing and his testimony is undisputed. During the early morning hours of September 20, 1994, the officer testified he had been patrolling on Pearl Road, periodically checking storefronts and businesses. At 1:42 a.m., the officer turned into a shopping center. A fast food restaurant fronted the street. A driveway intersected the restaurant parking lot and the shopping center parking lot. A concrete divider separated the back of the restaurant parking lot from the shopping center, although the divider contained an opening that would allow traffic to pass from the restaurant parking lot to the shopping center parking lot.

The officer noticed defendant's vehicle parked in the shopping center lot, its parking lights on but the engine off. Because of the late hour and the absence of other vehicles in the immediate area of the shopping center, the officer determined the driver of the vehicle might need assistance. As he approached the vehicle, he noticed the car keys in the ignition. Although the vehicle was not running, the keys had

been turned so as to activate the electrical system and illuminate various systems lights on the dashboard. The officer cited defendant with operating a motor vehicle while under the influence of alcohol, driving under a twelve point suspension, failed consent, and failure to pay a reinstatement fee.[1]

The court found the facts showed defendant had been awake in his car with no indication he had been engaged in criminal activity. In addition, there were no reports of criminal activity to justify the officer's approach. The court granted the motion to suppress, ruling the city presented no evidence demonstrating the officer possessed "any articulable reason to investigate" defendant's parked vehicle.

Not every warrantless contact between a police officer and a citizen is subject to the Fourth Amendment. In *Terry v. Ohio* (1968),

---

[1] The record indicates defendant's driver's license had been suspended three times previously for driving while under the influence of alcohol: in June 1991, September 1992, and December 1993.

392 U.S. 1, 19, at fn. 16, the court stated, "[o]bviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." In *United States v. Mendenhall* (1980), 446 U.S. 544, 554 (plurality opinion), the court noted, "[t}he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *Id.* at 191, citing 446 U.S. 544, 554-555 (internal citation omitted); see, also, *State v. Smith* (1989), 45 Ohio St. 3d 255, 257-260, reversed on other grounds, *sub nom. Smith v. Ohio* (1990), 494 U.S. 541; *State v. Johnson* (1986), 34 Ohio App. 3d 94, 96.

Hence, the distinction between an intrusion amounting to a seizure of the person and an encounter that intrudes upon no constitutionally protected interest centers on the nature of contact. "A person has been seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall, supra,* at 554; see, also, *Florida v. Royer* (1983), 460 U.S. 491, 497; *I.N.S. v. Delgado* (1984), 466 U.S. 210.

This concept of restraint requires consideration of all the surrounding circumstances. In *Mendenhall*, the plurality noted circumstances carrying an indicia of authority sufficient to comprise a seizure might include, "[the] threatening presence of several police

officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 554. The court has further refined the concept of seizure to incorporate an element of physical restraint. In *California v. Hodari D.* (1991), 111 S.Ct. 1547, the court focused on the presence of physical force to determine that no seizure occurs when, without more, an officer makes a "show of authority" to an individual but the individual rails to yield to the officer's authority. *Id.* At 1552; accord *Florida v. Bostick* (1991), 501 U.S. 429, 439; *State v. Williams* (1990), 51 Ohio St. 3d 58, 61 (police officer's initial question to defendant, "I asked him what he was doing there" cannot be construed as a restraint upon liberty); *State v. Mosely* (Oct. 13, 1994), Cuyahoga App. No. 67214, unreported (asking defendant to come over to police car for questioning has no element of physical force).

Defendant purposefully choose not to raise any issues relating to a seizure. Defense counsel stated:

> "MR. DAIKER: * * * In terms of the motion that we have filed, it is based solely on the stop and it does not concern the field sobriety test. "
>
> "THE COURT: All right."
>
> "MR. GAMBINO: That helped me, Judge, and I appreciate it. I wasn't sure how far the record wanted to go."
>
> "THE COURT: Okay. So once he gets up to the window of the car to talk to the Defendant, that is the

time frame in which -- that is at issue?"

"MR. DAIKER: That's correct, your Honor, That's how narrow it is."

By narrowing the ground for his motion, defendant waived all other issues that might have been raised in the motion to suppress, including any issues relating to a seizure. "In order to require a hearing on a motion to suppress evidence, the accused must state the motion's *legal* and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided." *State v. Schindler* (1994), 70 Ohio St. 3d 54, syllabus (emphasis added); *Xenia v. Wallace* (1988), 37 Ohio St. 3d 216, paragraph one of the syllabus. A defendant's failure to adequately raise the basis of his challenge constitutes a waiver of that issue on appeal. *Xenia v. Wallace*, *supra*, at 218; *Bryan v. Fox* (1991), 76 Ohio App. 3d 607, 610.

There is simply no evidence suggesting the arresting officer seized defendant. The officer merely approached defendant because the circumstances suggested defendant might require some assistance. The officer testified:

> "Well, I thought it was suspicious. So I approached the vehicle to see if there was something wrong with the driver, you know, or what he was doing, first of all, make sure that he was okay, that he wasn't sick, that he was not unconscious or hurt or injured or if he was performing any criminal activity."
> (emphasis added).

Because the arresting officer's testimony ends before he

approached defendant's car, we have no evidence upon which we could conclude a seizure occurred. Accordingly, we find the trial court should not have granted the motion to suppress. We sustain the assigned error and remand for further proceedings.

Judgment reversed and remanded.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee its costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

"s/John T. Patton"

JOHN T. PATTON,
CHIEF JUSTICE

"s/James M. Porter"

JAMES M. PORTER, JUDGE

"s/Sara J. Harper"

SARA J. HARPER, JUDGE,
DISSENTS, SEE DISSENTING
OPINION ATTACHED

JOURNALIZED DEC 11 1995
GERALD E. FUERST, Clerk of Courts
By _____ Deputy.

N.B. This entry is made pursuant to the third sentence of Rule 22 (D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for

review will begin to run.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 68316

CITY OF STRONGSVILLE	:	DISSENTING
	:	JOURNAL ENTRY
Plaintiff-appellant	:	AND
	:	OPINION
-vs-	:	
	:	
THOMAS G. RUSSELL	:	
	:	
Defendant-appellee	:	
	:	

DATE: NOVEMBER 30, 1995

SARA J. HARPER, J., DISSENTING:

I respectfully dissent from the majority's decision. The trial court, in my opinion, correctly determined in the case *sub judice* that the police officer lacked an articulable reason to approach appellee's vehicle and investigate. For the reasons stated herein, the trial court's decision to grant defendant-appellee's motion to suppress evidence should have been affirmed.

In reviewing a motion to suppress, we accept the trial court's findings of fact and rely on its ability to evaluate the credibility of the witnesses. *State v. Mills* (1992), 62 Ohio St. 3d 357, 366 citing *State v. Fanning* (1982), 1 Ohio St. 3d 29.

To determine whether the police's intrusion into the

constitutionally protected interests of a private citizen is valid, the *Terry* standard requires that a police officer must be able to point to specific and articulable facts, which taken together with rational inferences from these facts, would reasonably warrant that intrusion. *Terry v. Ohio* (1968), 393 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed. 2d 889, 906. A police officer may stop and investigate unusual behavior, even without probable cause to arrest, when he possesses reasonable suspicion, based on specific and articulable facts, that a suspect is engaging in, or is about to engage in criminal activity. *State v. Evans* (1993), 67 Ohio St. 3d 405; *State v. Andrews* (1991), 57 Ohio St. 3d 86, 87.

At the motion to suppress hearing, the arresting officer testified that he saw appellee seated upright and awake, in a parked vehicle in the parking lot adjacent to the Taco Bell restaurant, during the early morning hours of September 24, 1994. As appellee sat in his parked vehicle, the arresting officer observed appellee's vehicle with its parking lights on and engine off. The arresting officer did not testify that he observed appellee engaging in any unusual behavior as he sat in the parked vehicle. Nor was appellee observed engaged in conduct that would indicate criminal activity. Moreover, the arresting officer testified he had not received any reports from the businesses surrounding the parking lot, concerning criminal activity, for which appellee could be a suspect.

Furthermore, the arresting officer could not identify any ordinance appellee may have violated by his conduct, before the officer reached the vehicle. Here, the trial court evaluated the arresting

officer's undisputed testimony, and failed to discern circumstances which supported the appellant's contention the officer had an articulable reason to approach appellee's vehicle to investigate.

Based on these facts, the trial court rendered a proper determination when it ruled the arresting officer lacked any articulable reason to approach and investigate appellee.

Consequently, the trial court's decision to grant appellee's motion to suppress should have been affirmed by this court.

THE STATE OF OHIO } I, GERALD E. FUERST,
CUYAHOGA COUNTY } SS. Clerk of the Court of Appeals within and for said County, and in whose custody the files, Journals and Records of said Court are required by the laws of the State of Ohio, to be kept, hereby certify that the foregoing is taken and copied from the Journal 390 Page 938 Dated December 11, 1995 Ca 68316 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal 390 Page 938 Dated December 11, 1995 and that the same is a correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 5th day of January A.D., 1996

GERALD E. FUERST, Clerk of Courts

By "s/Betty J. Arko" Deputy Clerk

FILED
JUN 12 1996
Marcia J. Mengel, Clerk
Supreme Court of Ohio

THE SUPREME COURT OF OHIO

1996 TERM

City of Strongsville,	:	Case No. 96-180
Appellee,	:	
	:	ENTRY
v.	:	
	:	
Thomas G. Russell,	:	
Appellant.	:	
	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Larry W. Zukerman, Esquire.

(Cuyahoga County Court of Appeals; No. 68316)

"s/ Thomas J. Moyer"
THOMAS J. MOYER
Chief Justice

BEREA MUNICIPAL COURT
11 Berea Commons * Berea, Ohio 44017* (216) 826-5860

STATE OF OHIO	:	Case No. 94TRC 3124
CITY OF Strongsville	:	
Plaintiff	:	JOURNAL ENTRY
	:	
vs	:	Offense:ORC Sec. 4511.19A1
	:	Ordinance Sec. _____
Thomas G. Russell	:	Offense date 9/20/94
Defendant	:	
	:	

December 12, 1994- Oral hearing had on motion to suppress. Officer testified that defendant was parked in a shopping center lot at 1:42 a.m. with parking lights on. Defendant was seated behind the wheel, was awake and displayed nothing unusual about the way he was sitting. There was no evidence of a crime having been committed in the area to warrant any investigation of some other activity that defendant might have been a witness to. No evidence that where defendant was parked or the activity defendant was engaged in was in violation of any law as far as the officer knew before he approached. Lacking any articulable reason to investigate, The motion to suppress is granted.

Date Signed: "12-12-94"

Date Journalized:_____

"s/ W.C. Todia"
Judge

RECEIVED

DEC 12 1994

BEREA MUNICIPAL COURT

IN THE BEREA MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO/ CITY OF STRONGSVILLE,	)	
Plaintiff,	)	
vs.	)	Case No. 94 TRC 3124
	)	Judge William C. Todia
THOMAS RUSSELL,	)	
Defendant.	)	

MOTION TO SUPPRESS HEARING

Transcript from audio cassette of the above-entitled matter which came on for hearing before Judge William C. Todia, on December 12, 1994, at the Berea Municipal Court, 11 Berea Commons, Berea, Ohio.

Barbara A. Oser, RPR
MORSE, GANTVERG & HODGE

APPEARANCES:

On behalf of the Plaintiff:

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(216) 238-1070

On behalf of the Defendant:

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160 Signature Square I
25201 Chagrin Boulevard
Cleveland, Ohio 44122
(216) 595-1300

PROCEEDINGS

THE COURT: This is the matter of Thomas Russell, 94 TRC 3124.

For the Prosecution is Mr. Gambino and Mr. Gall, and for the Defendant is Paul Daiker is it?

MR. DAIKER: Daiker, yes. Thank you, your Honor.

THE COURT: All right. So is there - - let us proceed then.

MR. GAMBINO: Your Honor, I believe, if I may at the outset, the nature of the motion deals exclusively with the probable cause of the arrest, and that's the sole issue bringing us here today.

MR. DAIKER: Now, if I can even narrow it further, it deals with probable cause for the stop which led to the arrest.

THE COURT: All right. One of the charges is - - well, let's see - - driving under the influence. There was no test.

MR. DAIKER: No.

THE COURT: There also are questions of driving under suspension, failed consent, failing to pay reinstatement fee, point system and FRA.

So we're really looking at the stop. Are we looking at anything after the stop in terms of the field sobriety tests or the evidence of being under the influence?

MR. DAIKER: No, your Honor. In terms of the motion that we have filed, it is based solely on the stop and it does

not concern the field sobriety test.

THE COURT: All right.

MR. GAMBINO: That helped me, Judge, and I appreciate it. I wasn't sure how far the record wanted to go.

THE COURT: Okay. So once he gets up to the window of the car to talk to the Defendant, that is the time frame in which - - that is at issue?

MR. DAIKER: That's correct, your Honor. That's how narrow it is.

THE COURT: All right. Then Mr. Gambino.

MR. GAMBINO: Thank you, Judge.

THE COURT: Do you wish to call your first witness?

MR. GAMBINO: Yes.

JEFF MASON

A witness, called for examination by the Plaintiff, having been first duly sworn, as hereinafter certified, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GAMBINO:

Q. Officer, would you state your full name and spell your last name for the Court?

A. Officer Jeff Mason, M-A-S-0-N.

Q. Where are you employed?

A. Strongsville, the City of Strongsville Police Department.

Q. And in what capacity are you employed there?

A. Police officer.

Q. How long have you been employed in Strongsville?

A. Seven months.

Q. Prior to your seven-month tenure with Strongsville, have you had any other experience in law enforcement?

A. Yes, I have.

Q. Where was that?

A. Prior to that I was police officer for six months in a medical complex in Lorain, and prior to that I was an auxiliary police officer with the City of Lakewood for fourteen years.

Q. The tenure that you have in Strongsville, the seven months you've indicated, had you received training to hold that position?

A. Yes, I have.

Q. And where did you receive your training?

A. At Cleveland Heights Police Academy.

Q. How long was that training program?

A. The basic academy was 13 and a half weeks.

Q. Was there an additional training besides the basic academy?

A. Yes, there was.

Q. What was that?

A. I took a three-day course at the University of Akron for police officers for DUI detection.

Q. Do you hold a Bachelor's degree?

A. No, I do not.

Q. Now, I'd like to draw your attention to the date of September 20, the early morning hours of September 20 of this year 1994 and ask if you were employed as a police officer for the City of Strongsville?

A. Yes, I was.

Q. Do you recall what shift you were on on that day?

A. I was working the night shift. It was 11:00 p.m. to 7:00 a.m.

Q. And while on that shift, were you assigned any specific duties and responsibilities?

A. Yes, I was.

Q. What were those duties?

A. I was in a marked police vehicle doing patrol of businesses and residential neighborhoods, regulating traffic, general patrol duties.

Q. You mentioned a marked police cruiser. Were you also in full uniform?

A. Yes, I was.

Q. Now, did there come a time when you observed the Defendant, Mr. Russell, or his vehicle?

A. Yes, there was.

Q. Can you describe to the Court when and where you first observed Mr. Russell's vehicle?

A. I was checking my businesses along Pearl Road. And in order to check the businesses, I pull in and out of the lots, shake some doors, et cetera, look for any suspicious activity in the area.

And on this occasion it was 1:42 a.m. on that date. I was driving pulling into the parking lot of - - I'm not sure of the address. 14411 I believe it is, but it's the parking lot behind the Taco Bell on Pearl Road. I was going there to check my businesses.

Q. Now, is that in the City of Strongsville?

A. Yes.

Q. The County of Cuyahoga?

A. Yes.

Q. State of Ohio?

A. Yes.

Q. And this was at 1:42 in the morning?

A. That's correct.

Q. This is part of your normal activities; is that correct?

A. That's correct.

Q. What is it then that drew your attention to Mr. Russell's vehicle?

A. There were very few vehicles in the area. There were no people in the area that I could see at all, just stragglers or maybe some vehicles that were parked that may have been employees of Taco Bell. But there were no other vehicles in the area, no other people in the area.

His vehicle was parked in the parking lot with its lights on, its parking lights on and it was occupied. And at that time of the night it's very unusual to see anyone parked in a business parking lot in an occupied vehicle.

Q. Okay. The area you're describing is the parking lot behind

the Taco Bell?

A. That's correct.

Q. Is it possible for you to draw on the board what it is you're referring to?

A. Sure. This would be Pearl Road here. This is north. There's a driveway that enters into Taco Bell. This is Taco Bell here. And there's a driveway also on this side of Taco Bell, too. This parking lot for Taco Bell has some spaces here, parking spaces along here and along here. And then there's a concrete divider here that separates Taco Bell's property from the rest of the mall, this shopping strip. The shopping strip runs along behind Taco Bell. There's a driveway that accesses all this, too (indicating).

The Defendant's vehicle was parked back here. This was the only business in the area that I'm aware of that would be open at that time. And to get to that rear parking lot, you have to exit the Taco Bell here. Most of the people that would go to Taco Bell would park - - would either go through the drive-thru or be parked in these spaces in here, this part back here (indicating).

Q. Is that Taco Bell open at 2:00 in the morning?

A. I don't recall what day of the week that was.

MR. DAIKER: Objection, your Honor. That does not establish - - nothing about 2:00 in the morning is established.

THE COURT: The testimony was 1:42 a.m.

MR. GAMBINO: Excuse me. I'll

rephrase the question.

Q. At about 1:42 in the morning do you know whether or not that Taco Bell facility is open?

A. It is open on certain days of the week, but I don't recall what day of the week this was.

Q. So Mr. Russell's vehicle was in the back of that concrete divider that you have identified there?

A. That's correct.

Q. Were there any other vehicles in that area?

A. There were no - - his vehicle was the only vehicle in the immediate area. I don't recall if there were vehicles anywhere way down there or way over here. But his was the only vehicle in that immediate area.

Q. And you had indicated, I believe, that the parking lights were on?

A. The parking lights were on.

Q. Okay. You can go back to your seat.

Now, as a result of that observation, what did you do?

A. Well, I thought it was suspicious. So I approached the vehicle to see if there was something wrong with the driver, you know, or what he was doing, first of all, make sure that he was okay, that he wasn't sick, that he was not unconscious or hurt or injured or if he was performing any criminal activity.

Q. Now, you mentioned you approached the vehicle to talk to the driver and find this information out. Is the driver present in the courtroom?

A. Yes, he is.

Q. Would you point him out, please?

A. Right over there (indicating).

Q. And then as a result of your initial contact with Mr. Russell, that then led to the charges presently before the Court; is that correct?

A. That's correct.

MR. GAMBINO: May I have a moment, Judge?

THE COURT: Yes.

MR. GAMBINO: Thank you, Officer. Mr. Daiker may have questions.

MR. DAIKER: Your Honor, if I may approach the bench?

THE COURT: Yes.

(Thereupon, a discussion was held at side bar.)

MR. DAIKER: If I may, your Honor.

THE COURT: Sure.

CROSS- EXAMINATION

BY MR. DAIKER:

Q. I am presenting you with here - - do you recognize this document?

A. Yes, I do.

Q. Can you explain to the Court what it is?

A. It's an alcoholic influence report form. It's the way we document a DUI arrest.

Q. Thank you. Officer, you said there were no other vehicles in the immediate area, correct?

A. From what I recall, that's correct.

Q. And what do you define as the immediate area?

A. Any cars - - I don't recall any cars being in the parking lot whatsoever. Now, if there were other cars that were parked way down on the strip that I would not have seen while I was working with the Defendant, I would consider that the immediate area.

Q. And the parking lots are connected, aren't they?

A. Yes, they are.

Q. You can go from one parking lot to the other, correct?

A. That's correct.

Q. And Taco Bell has parking areas, correct?

A. Yes, it does.

Q. Were there cars parked in the Taco Bell parking lot?

A. I don't recall.

Q. You don't recall. Do you recall whether the Taco Bell lights were on - - the lights of the building were on at that time?

A. I don't recall.

Q. Now, the vehicle in question, where exactly was it parked in reference to any of the other stores in that area?

A. It was parked almost exactly midway between the concrete barrier of Taco Bell and that of the storefronts, in the middle of the

parking lot.

Q. So it wasn't parked in the first row of the parking spaces for the stores in there, correct?

A. That's correct.

Q. And it wasn't parked along the side next to the stores, correct?

A. That's correct.

Q. Okay. Officer, you never observed the Defendant driving the vehicle, did you?

A. Driving?

Q. You didn't see him drive into Taco Bell, did you?

A. No, I did not.

Q. You didn't see him leave Taco Bell, did you?

A. No, I did not.

Q. You didn't see him operate on Pearl Road, correct?

A. I did not see the vehicle on Pearl Road.

Q. You didn't see the - - did you ever see the vehicle move?

A. I did not see the vehicle in motion.

Q. Did you ever receive a complaint that the Defendant was driving erratically or anything - -

A. No, I did not.

Q. - - concerning the vehicle?

And you never received a complaint about the Defendant violating the law?

A. No, I did not.

Q. Did you receive any complaints from any of the store

owners that anything had happened that evening?

A. No, I did not.

Q. Did you see any type of entry into any of those stores that you're - -

A. I had not yet checked the businesses. So I couldn't answer that.

Q. And it's not illegal to be out at 1:40 in the morning, is it?

A. Depending upon your age.

Q. But if you are of age, it's not illegal to be out at 1:42 at night?

A. No, it's not.

Q. Anyone can be out at that time?

A. Anyone that's of age.

Q. And it's legal to sit in a car, isn't it?

A. It's legal to sit in a car provided that, you know, you are not trespassing or you're not in a place that's unusual to be in.

Q. It's legal to sit in a car in a parking lot?

A. That's true, yes.

Q. And there's no ordinance against parking in that parking lot, is there?

A. No, there's not.

Q. And there's no ordinance against parking in that parking lot at that time in the morning, is there?

A. No, there's not.

Q. There were other cars in that parking lot?

A. Well, there was mine and his. I don't recall - -

Q. There were other cars in the area though, weren't there?

A. There may have been. But in the immediate area - - since I was focused on him, I don't recall if there were cars parked waiting on either side of his car. But there were no cars in the immediate area that would have caught my attention.

Q. And it's legal to be sitting in a vehicle with your parking lights on, correct?

A. Yes, it is.

Q. The Defendant was awake in his vehicle when you approached?

A. Yes, he was.

Q. Was the engine running?

A. The engine was not running.

Q. So prior to stopping the Defendant, had you observed him violating any traffic law?

A. No traffic law.

Q. Did you observe him violating any law whatsoever?

A. I have not checked that out yet.

Q. But you had not observed him violating the law?

A. I had a reasonable suspicion that I had to check out his vehicle prior to making that determination.

Q. But your reasonable suspicion was not based on any known criminal activity, correct?

A. It was based on my suspicion of his vehicle parked at that time.

Q. Of his vehicle parked?

A. Um-hum.

MR. DAIKER: I have no further questions, your Honor.

REDIRECT EXAMINATION

BY MR. GAMBINO:

Q. Officer Mason, Mr. Daiker had asked you a couple questions concerning whether or not you saw the Defendant I think he used the word driving, I'm not sure, on either Pearl Road or the parking lot of Taco Bell or leaving the parking lot. Do you recall those questions?

A. Yes, I do.

Q. And you said no, you didn't see it moving?

A. That's correct.

Q. You did indicate and reaffirm that it's not against the law to have the parking lights on and to sit in the car?

A. That's correct.

Q. He asked you whether or not the engine was running, and you said no, the engine wasn't running. And you were going to say something else, and he went like this (indicating)?

A. Yes.

Q. What was it you were going to say?

A. Well, the engine itself was not running; however, the driver was in the driver's seat, the ignition key was in the ignition, the ignition was unlocked and the red lights or what we call idiot lights,

the red lights on the instrument panel were lit.

Q. Did you hear any chiming or anything like that?

A. I don't recall.

Q. But the keys were in the ignition and the lights on the dash or idiot lights, as you refer to them, were, in fact, on, correct?

A. Yes, they were.

Q. Was there anyone else present in the vehicle with the Defendant?

A. No, he was alone.

MR. GAMBINO: Thank you. I have nothing further.

THE COURT: As you approached the vehicle, I think you said the driver was behind the wheel of the car. Now, what was his position in the car? Was he sitting up?

THE WITNESS: He was sitting in a normal position in the car.

THE COURT: Anything abnormal about his position?

THE WITNESS: It wasn't his position that - -

THE COURT: Well, I'm just asking about the position of the driver.

THE WITNESS: No, you Honor. He was just seated behind the driver's seat, the driver's wheel.

THE COURT: Anything further?

You may step down, at least, Officer.

THE WITNESS: Okay.

MR. GAMBINO: Your Honor, I have nothing further on behalf of the State.

THE COURT: Okay. On behalf of the Defendant?

MR. DAIKER: Nothing further besides my motion.

THE COURT: All right. Then I guess it's your motion, Mr. Daiker.

MR. DAIKER: Thank you.

THE COURT: So what do you have to say?

MR. DAIKER: Thank you, your Honor. Your Honor, we made this motion on November 18, 1994. In this motion we alleged that there was no probable cause for Arresting Officer Mason to stop the Defendant in this case. We made this motion pursuant to Ohio Criminal Rule 12 (B) 3 that the stop and search and seizure of the Defendant was an unconstitutional search and seizure in violation of the 4th and 14th Amendments of the Constitution or Article 1, Section 14 of the Ohio Constitution.

From the testimony before you today, your

Honor, the facts have shown that the Defendant was stopped without the officer observing any violation of the law, no traffic violation, no violation of any law whatsoever. He was merely sitting in his vehicle in the Taco Bell parking lot or the parking lot behind Taco Bell according to the Officer. This is completely legal. The officer stated that.

Case law has been established, which shows that an individual must be free from any unreasonable stops, searches and seizures. This goes back to Mapp v. Ohio, which makes the 14th Amendment applicable to the states. It also goes to Terry v. - - or Ohio v. Terry: When the constitutionality or the validity of an investigative stop and arrest is challenged, the burden of proof is placed on the state to prove that there was probable cause beyond a reasonable doubt.

Your Honor, in United States v. Cortez the United States Supreme Court held that a stop must be justified by some objective manifestation that the person stopped is or is about to be engaged in criminal activity.

And an officer's - - Columbus v. Holland, a 1991 case in the State of Ohio, 76 Ohio Appellate 3rd 196, the Court of Appeals for Ohio, 10th Appellate District held that an officer's intuition

constitutes insufficient evidence to predicate a stop. Therefore, when an officer makes a traffic stop primarily based upon a hunch that the operator of the vehicle may be violating the law, the stop is improper.

Even more recently, in State v. Carter, 1994, 69, Ohio State 3rd, 57 the Supreme Court of Ohio held that evidence gained from the search of an automobile must be suppressed when the investigatory stop occurs without the officer observing the defendant violating any law.

In addition, I cited in my brief, your Honor, Maumer v. Johnson, Mason v. Loveless, New Lebanon v. Blankenship. All these are recent court decisions, which show that the police officers lack reasonable and articulable suspicion for an investigatory stop if the Defendant was not traveling in a legal manner.

Finally, your Honor, under the 4th Amendment and under Terry v. Ohio, any illegal stop which brings about evidence from this illegal stop is inadmissible in court.

Your Honor, in this case we have an officer who was doing his job; however, he did not observe any illegal activity. Just because it's 1:42 in the morning doesn't mean that you can stop someone.

Clearly, he stopped my client based on a hunch, but the courts have held that a hunch is not enough. In this case, your Honor, I move to suppress the evidence of this case based on it's an improper stop.

Thank you, your Honor.

THE COURT: Mr. Gambino.

MR. GAMBINO: Your Honor, I think, first of all, the Court has a chance to view this as does a law enforcement officer in handling these types of cases.

First, an officer must have reasonable, articulable suspicion for the stop, an investigative stop. Assuming that is reasonable, that then leads to the building of probable cause by virtue of whatever he finds, whether it's an odor of alcohol, suspended license or whatever.

Really what we're dealing here with, Judge, is the reasonable, articulable suspicion. And that's a fancy way of saying what was it that drew the officer's attention to this vehicle; reasonable, articulable meaning he can utter it, and suspicion, it's not a stop to arrest this individual.

This officer just before 2:00 in the morning, 1:42 in the morning observes a car in a parking lot behind a Taco Bell restaurant accessible, a parking lot accessible by driveways but seperated by a

concrete barrier. This car is all by itself. He's testified he's there because he's checking the businesses.

Now, he didn't say he thought that that fellow in that car, because there was a fellow sitting there, was going to break into those places. He just said it looked suspicious to him, and as a result, maybe be was sick, maybe he needed help, maybe he was a burglar. Who knows? That's his job. His job is to find out.

He couldn't, in fact, articulate what drew his attention to the vehicle that the Defendant was occupying. That's really the question here. Now, you know, an objective manifestation. The officer clearly stated what it was that drew his attention to the vehicle and why he went over to the vehicle.

Now, it's no different than a Terry stop, your Honor, which is legitimate for investigative purposes. No, it's not to make an arrest. Officer Mason didn't indicate he went over there because there were no parking signs and he was going to arrest that occupant. He went over there to find out why he was there.

Now, I think if the Court were to view the cases of McGlone and Cleary, which clearly were non-operative cases, the defendant in both of those

cases, which are, in fact, I believe, both Supreme Court cases in this state clearly indicate that operation is more than driving. They also indicate that the officer in those cases does not have to observe operation. They don't say one is guilty of the offense. What they say is he can be convicted.

So when they're talking about reasonable, articulable suspicion, I submit to the Court we never got to probable cause in this hearing because it wasn't an issue. What transpired as he approached the vehicle, other than seeing the red lights on and the key in the ignition, and the sobriety test, we never got to that point. It's really whether or not this officer had reasonable, articulable suspicion for, and I won't call it a stop, approaching the vehicle, detainment.

If it's a detainment, then it's a stop because we stopped him from leaving. It isn't like a stop on the roadway for an alleged violation; it's merely an investigative detainment, if you will. The car wasn't even running, so it wasn't like he was going anywhere. The officer wanted to find out what's going on, why is he here.

I believe that under the Terry case based then - - assuming that's reasonable, based then on his observations, which we didn't get to, based on his

observations, he could proceed accordingly, whether it would be asking him to step from the car, conduct sobriety tests and whatever that may be. That's not the issue here.

The question really is the articulable suspicion. The fact that, you know, there was a hunch - - there's no hunch here. He didn't have a hunch that this fellow was under the influence of alcohol. He had a suspicion because here is an empty parking lot at almost 2:00 in the morning and he had a reason and he had a reasonable right to go see what's going on. His job is to make sure the businesses are, in fact, secure and that the motorists or parked, stopped vehicles, whether they have their parking lights on or not, are okay. He does his job. And I would submit that the motion to suppress in this case should be overruled.

Thank you.

MR. DAIKER: If I may, your Honor, just briefly?

THE COURT: Yes.

MR. DAIKER: The Prosecutor has addressed two cases, McGlone and Cleary. Both of these cases can be distinguished from the present case because the defendants in those cases were asleep in the vehicle. An officer would have a

probable cause to stop someone in a vehicle if they noticed that the defendant is asleep in the vehicle. That was not the case in our case. And I believe that your questioning of the officer was very pertinent; how was he sitting in the vehicle, did it look like he was in a position to operate the vehicle, you know, under normal guidance.

In addition, I would like to address the stop issue. Clearly, the Defendant was not free to go once the officer came upon the vehicle. To me, that constitutes a stop, and it's an infringement of his liberties. Therefore, it is a stop, it is a search, it is a seizure, and, therefore, because there was no probable cause to do it, I believe that my motion to suppress should be granted.

Thank you, your Honor.

THE COURT: Those two cases that you referred to, Mr. Gambino, are they in the briefs anywhere?

MR. GAMBINO: I doubt very much if it's in defense counsel's brief.

THE COURT: But the ones you referred to - -

MR. GAMBINO: McGlone and Cleary?

THE COURT: What were the general fact situations or what did they - -

MR. GAMBINO: Your Honor, basically both of those cases deal with - - I don't recall the defendants in each of those cases being asleep. I don't recall, but that may be. I believe the engine was running in those cases.

Basically what the Supreme Court of the State of Ohio did was abolish what used to be known as physical control under city ordinances.

THE COURT: But it had more to do with the issue of operating - -

MR. GAMBINO: Yes, it has to do with operation.

THE COURT: - - as opposed to - - because the cases regarding operating would indicate just having the keys in your pocket and being in the car.

MR. GAMBINO: I don't think there's a Supreme Court case that says that.

THE COURT: Is that right?

MR. GAMBINO: In fact, all of the Supreme Court cases that we have, including McGlone & Cleary, have the keys in the ignition.

THE COURT: Okay. But it was a question more of operation - -

MR. GAMBINO: Correct.

THE COURT: - - than it was the

question of even a Terry stop or an investigative - -

MR. GAMBINO: That is correct.

THE COURT: So basically that would not be particularly relevant to the issue here?

MR. GAMBINO: Other than the fact that defense counsel maintains that there was no observed driving in questioning the officer and that he didn't see him violate any traffic laws. That's why I think it is significant.

THE COURT: Okay. Probably testimony of the officer there may be a variety of reasons why under similar cicumstances an officer may approach and do an investigation, and one that was suggested by the officer was that the defendant may be in need of some help or sick and that sort of thing, which is a perfectly legitimate reason for an officer to approach. But when the officer observed that the man was sitting there with no unusual posture and, obviously, awake and not in any distress of any sort, the reason to talk to him regarding whether he needed help or not was no longer valid.

There is no indication of anything being done wrong by the Defendant, and there is no indication that there was any crime that was committed in the area where people who just happened to be in the area should be subject to questioning as potential

witnesses had there been a break-in or some such thing of that nature. It really gets down to a question of articulable cause to even talk to him, and I find there is no such articulable cause. And the motion to suppress would be sustained.

There's an interesting case you may have read recently. I don't know if it was in the recent OBAR. I only read it last week after six months of them piling up. But it was where an officer routinely asked people if he could search their vehicles. Did you read that one?

MR. GAMBINO: No.

THE COURT: He routinely asked if -- on traffic stops. This one was 9:30 in the morning, and he found cocaine in the luggage in the back seat. It was a stop, a legitimate stop. He gave her a traffic ticket, a speeding ticket, wrote it out, went back to the vehicle, asked the lady to come out of the vehicle and he talked to her, he handed her the ticket, said have a good day, you're free to leave. Then she turned around to get in the car, and he said, oh, excuse me, one more thing, do you mind if I search your car. And she said go ahead.

He testified that he had done 700 such searches in a year. It may have been a trial court decision. It probably was, but I can't imagine it

getting beyond a trial court. But it was just routine, you ask somebody. And who knows what it will show? And no suspicion of anything. The only reason for stopping, the only suspicion of any conduct at all was the traffic and the speeding ticket. And the officer even went so far on the stand to say, well, sometimes I do it just for practice.

So in any event, this one doesn't make muster, and the motion to suppress is granted. But that's as far as I can go on the motion to suppress, correct?

MR. GAMBINO: That's right.

THE COURT: Where are we going from there?

MR. GAMBINO: Probably the 8th District. We might as well, Judge. We might as well.

THE COURT: Well, I mean, we are scheduled for a jury trial on the 14th.

MR. GAMBINO: Obviously, I'm not in the position to go forward with the suppression because I can't present any testimony.

THE COURT: And are you - -

MR. GAMBINO: I'm not going to dismiss it, no. I'm going to ask for separate findings of fact and conclusions.

THE COURT: But do we call it for

trial and then dismiss it for want of prosecution because you don't have any testimony?

MR. GAMBINO: I don't think you can do that.

THE COURT: Why is that?

MR. GAMBINO: Procedurally, I don't think - - I mean, I can't go forward because you have precluded me from doing so in the ruling.

THE COURT: Right.

MR. GAMBINO: And that's only right.

THE COURT: And is that then an interlocutory appeal or do I first have to find - - you know, you can have a motion to suppress which is sustained and then there's still enough evidence to go forward and there is a conviction. You can have a situation like that. It's not going to happen here.

MR. GAMBINO: No.

THE COURT: But procedurally, I'm just wondering if you wanted to - -

MR. GAMBINO: See, usually it's the defendant that, if it's overruled, would presumably plead no contest and expedite and facilitate - -

THE COURT: Right.

MR. GAMBINO: It's a unique situation.

THE COURT: It's the other side of the coin. And it would seem to me we need a

disposition of it, unless there's some reason for a stay pending. But I don't think it's an appealable issue until we have a determination either of a finding of guilt, and then you need appeal, or a dismissal for lack of evidence.

MR. GAMBINO: See, how can I do that? You can do that; I can't.

THE COURT: I know. I can do it. I mean, if that's appropriate, I could ask if we could dispose of it now and I could ask for a jury - - if you want to waive the jury trial and proceed to trial.

MR. GAMBINO: Could we divert until tomorrow - -

THE COURT: Sure, absolutely.

MR. GAMBINO: - - with respect to that issue because probably it's got me kind of - -

THE COURT: And check the procedure out.

MR. DAIKER: Myself, your Honor, too. I don't know - -

THE COURT: Check the procedure.

MR. GAMBINO: And I'm not saying - -

THE COURT: Because I don't want to put anybody in a - -

MR. GAMBINO: I think it's a significant issue, I really do, in this area.

THE COURT: All right. Well, sure. Then the question would be how we'd go from there.

MR. DAIKER: So pretty much assume that - -

MR. GAMBINO: The trial is not going to go forward.

MR. DAIKER: - - that the trial will not go forward.

MR. GAMBINO: I think that's a fair assumption.

THE COURT: And it may be that the trial would go forward but on a very perfunctory fashion. So we'll see how that goes. And it may be that it would be a waiver of the jury trial and then it would be even more perfunctory. Otherwise, we'd have to go beyond the opening statement. We'd have to actually see the jury and get beyond an opening statement, and that would not be necessary.

This is the sole issue, and I thank both of you for isolating the issue and not requiring a lot of additional testimony which wouldn't have been necessary to the decision.

MR. DAIKER: Thank you, your Honor. I appreciate it.

MR. GAMBINO: Thank you.

THE COURT: Thank you.

- - -

(HEARING CONCLUDED)

- - -

CERTIFICATE

STATE OF OHIO,)
) SS:
COUNTY OF CUYAHOGA.)

I, Barbara A. Oser, a Registered Professional Reporter and Notary Public in and for the State of Ohio, duly commissioned and qualified, do hereby certify that the foregoing is a true, correct and complete transcription, to the best of my ability, of the audio cassette tape which was produced at the time and place in the foregoing caption specified.

I do further certify that I am not a relative, employee or attorney of any party, or otherwise interested in the event of this action.

"s/ Barbara A. Oser"
Barbara A. Oser, RPR
Notary Public in and for
the State of Ohio.

My commission expires October 27, 1995.